U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: LIN 99 048 51614 Office: Vermont Service Center Date: FEB 14 2000

IN RE: Petitioner:
Beneficiary: [redacted]

Public Copy

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a software developing and consulting firm, seeks to employ the beneficiary for an unspecified time at $45,000 annually as a programmer/analyst in the H-1B classification for specialty occupations. The director requested additional evidence and the petitioner responded on February 22, 1999 (I-797 response). In a decision issued April 10, 1999, the director determined that the petitioner did not prove that it had a position in a specialty occupation which qualified as such. The petitioner appealed on May 13, 1999 (appeal), and counsel submitted a brief and annexures.

Provisions of § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), accord nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. The definition in § 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), describes a "specialty occupation" as one which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Regulations in 8 C.F.R. 214.2(h)(4)(ii) define the term specialty occupation as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor, including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The specialty occupation itself must meet one criterion related to a particular position, as found in 8 C.F.R. 214.2(h)(4)(iii)(A):

> *1.* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> *2.* The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular

position is so complex or unique that it can be performed only by an individual with a degree;

3. The employer normally requires a degree or its equivalent for the position; or

4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The appellate brief related conditions of the petitioner's alleged position,

> ... The petitioner is not only providing consulting services to different companies but also provides further training to its employees and creates software with intention to sell in open market. In fact the petitioner will be employing the beneficiaries [sic] for creation of software as well as to place them with different big companies with whom the petitioner has already entered into contracts. The petitioner already submitted five different contracts with companies containing the details of the terms and conditions including remuneration and duration. If for some reasons the beneficiary [sic] is not acceptable to other companies, the petitioner would utilize their services for the creation of various software in its own office....

These conditions ceded control over the beneficiary's acceptance and the reasons for his refusal to third parties at the outset. Yet, the petitioner must offer a particular position pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A). The director explicitly requested evidence of the employer, dates of employment, and duties of the beneficiary. The data proved no particular position in a specialty occupation, which was immediately available. The petitioner did not tender a particular position. If offered to prove, rather, a series of multiple job locations for the beneficiary over a three year period. No itinerary specified them, as required upon the filing of the petition. 8 C.F.R. 214.2(h)(2)(i)(B). Also, the petitioner lacks the financial capacity to provide positions in software development and training to undeterminable beneficiaries whom third parties refuse after their entry to the United States.

The brief further offered to prove in its Annexure-4,

> ...**Availability of immediate specialty occupation jobs**
>
> [The petitioner] ascertains that it has not applied for any beneficiary, who has no immediate specialty occupation jobs. With every petition filed to the

> Service [the petitioner] has also provided a documentary evidence stating the details of job activity the individuals would be doing on the approval of the petition. The documentary evidence provided has all the contact information for the client/customers to whom the beneficiary applied for by [the petitioner] will be providing support services for....

The director must ascertain whether the petitioner offers the beneficiary a particular position in a specialty occupation and could not do so in these proceedings. The petitioner proposed the title of programmer and analyst, but a third party offered the particular position. The offer of proof, namely, "stating the details of job activity the individuals would be doing on approval of the petition," did not constitute the petitioner's offer of a particular position. 8 C.F.R. 214.2(h)(4)(iii)(A). All of the contact information for the employment of beneficiaries referenced the third party companies. The petitioner had no contract or agreement with the beneficiary, though one is mandated with the petition. 8 C.F.R. 214.2(h)(4)(iv)(B). None established the petitioner's status as a United States employer to hire, fire, supervise, evaluate, or otherwise control the beneficiary's employment and performance pursuant to 8 C.F.R. 214.2(h)(4)(ii).

Exemplars of purchase orders and forms on appeal did not clarify if the employee received the hourly rate or if the petitioner did, from which to pay a beneficiary. Neither a third party nor the petitioner had any agreement with the beneficiary. A contract or summary of the oral agreement between the petitioner and the beneficiary must accompany the petition, but did not. 8 C.F.R. 214.2(h)(4)(iv)(B).

The third party, as the importing employer, made no petition for the beneficiary. See § 214(c)(1) of the Act, 8 U.S.C. 1184(c)(1). The I-797 response and the appellate brief necessitated multiple employers during three years. Yet, none made a petition for the beneficiary. 8 C.F.R. 214.2(h)(2)(i)(C).

The petitioner offered a roster, "Proposed Turnover Details Global ERP Solutions LLC For the Financial year of 1999." The beneficiary appeared among those with the legends,

> "Employees proposed to be recruited = 40
>
> No[.] of Employees already confirmed for work with PO's on hand = 15 (INS authorization pending)."

Contrary to the legend, no PO (purchase order) confirmed a total of 15 employees, the beneficiary, or any. The record documented five (5) contracts with different companies, but only one purchase order for a beneficiary, whose services were said to be "providable."

The petitioner's financial data was not clearly business related and did not support the current hiring of any employee. The facts established no capacity as a United States employer.

The appellate brief in Annexure - 1 stated its capacity as an importing employer in the United States in merely aleatory terms,

> As a result of its efforts, [the petitioner] could get some organizations believe on its credibility and technical stability by the last quarter of 1998.
>
> [The petitioner] could bag contracts for provision of Technical services to End Clients and specific Software Consultant Vendors (as [the petitioner] is not up to the mark for consideration as a Vendor by big End clients), who are in turn vendors to bigger end clients with all its efforts by the first half of last quarter of 1998.

Counsel has cited unpublished decisions of the Service in support of the appeal. Their relevance is limited. Service decisions designated as binding precedents are published and made available to the public pursuant to 8 C.F.R. 103.3(c). These unpublished decisions are neither precedents nor binding.

The evidence lacked five elements, namely, a contract or oral agreement between any party and the beneficiary, an itinerary from the petitioner for the beneficiary, a United States employer, an importing employer, and a particular position in a specialty occupation. The statute and regulations furnished no basis to reverse the director's decision or to approve this petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.